No. 87-644

(3)

In The

Supreme Court of the United States

October Term, 1987

CHARLES E. SCHMIDT, et al.,

Petitioners,

vs.

DON SERPAS, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether random, warrantless investigatory stops, searches and seizures of backstretch workers and searches of their homes, conducted at the unbridled discretion of law enforcement personnel and without any individualized suspicion of wrongdoing, violate the Fourth Amendment to the United States Constitution.

2. Whether the extraordinary act of abstention by a federal court is appropriate when the challenged conduct of the state raises an unavoidable constitutional question and when the state never raised the issue until after the argument on appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases *Page (s)*

Statutes

Rules and Regulations

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STATEMENT OF THE CASE

Respondents Don Serpas, Raymond Johnson and Carl Waters, individually and on behalf of all exercise persons, grooms and hotwalkers at Illinois racetracks (collectively, "backstretchers"), filed this action under 42 U.S.C. § 1983 against members of the Illinois Racing Board (the "Board") and officials of the Illinois Department of Law Enforcement (the "IDLE"), petitioners herein. The petitioners are individually identified in the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

(hereinafter "Petition").

Respondents sought declaratory and injunctive relief to prevent petitioners from conducting random, warrantless investigatory stops, searches and seizures of backstretchers and their residential quarters without any individualized suspicion of wrongdoing and without any limitation on the scope of search. Respondents also sought declaratory and injunctive relief to prevent petitioners from conditioning the issuance of occupation licenses upon consent to such practices. The challenged practices were authorized by the Board's Thoroughbred Rule 322 and Harness Rule 25.19 (the "Rules," quoted in full in the Petition at 10-11).

Petitioners contended that the challenged practices fell within the administrative search exception to the Fourth Amendment to the United States Constitution. According to petitioners, respondents had a reduced expectation of privacy by virtue of participation in a highly regulated industry and the challenged search practices were constitutionally reasonable with or without statutory authorization or any other limitation on the scope of search.

The District Court rejected petitioners' defenses and awarded respondents first a preliminary injunction and then a permanent injunction by way of summary judgment. The United States Court of Appeals for the Seventh Circuit, in both its original and amended opinions, affirmed the holding of the District Court that the challenged practices were unconstitutional under the Fourth Amendment. *See* Appendix to the Petition (hereinafter "Appendix").

1. The Nature of Respondents' On-Track Living Quarters

Backstretchers are migrant workers who live and work on the backstretches of Illinois racetracks "feeding, grooming, exercising and generally taking care of the race

horses." *Serpas* at A2.* Jockeys are not members of the class of backstretchers represented by respondents. As the uncontested proof in the District Court established, backstretchers' on-track living quarters are used exclusively for residential purposes. *Serpas* at C5. Most backstretchers reside in such rooms out of economic necessity as they migrate from track to track during the racing season. *Serpas* at D8 n.6. Backstretchers' families often live in these residential quarters for the same reasons. Record at 65, pp. 5-6.** The Court of Appeals held that the backstretchers' on-track lodgings are their homes for Fourth Amendment purposes regardless of whether they are temporary or accessible to track authorities by a master key. *Serpas* at A9.

2. The Nature of the Challenged Searches

It is uncontroverted that backstretchers and their residential quarters have been subject to warrantless investigatory stops, searches and seizures, and that these challenged practices have been regularly conducted without an individualized suspicion of wrongdoing and at the unfettered discretion of IDLE agents in the field. *Serpas* at C8. As the Court of Appeals held, both the Illinois Horse Racing Act of 1975 (the "Act") and the Rules under which the IDLE agents operate:

> do not impose any meaningful limitations on their discretion[:] . . . The searches may be focused or random and are not restricted to particular times nor restricted to particular areas or items in those areas which are in plain view . . . . [T]he agents

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* All citations to the decisions of the courts below are referenced to Exhibits A through D of the Appendix.

** All Record references are to the Record on Appeal as designated in the district court, hereinafter referred to as "R." Record Number 65 is Plaintiffs' Statement of Uncontested Facts in Support of Plaintiffs' Motion For Summary Judgment.

> may search plaintiffs' living quarters and personal effects as extensively as they wish. Plainly, the agents have an unrestricted scope of search ....

Serpas at A10, quoting from *Serpas* at C8.

Prior to the entry of injunctive relief, searches of the backstretchers' homes were "exhaustive." *Serpas* at C8. Uncontested proof in the District Court established that, at all hours of the day and night, IDLE agents rummaged through the entire contents of backstretchers' quarters, including clothing, cupboards, medicine cabinets, mattresses and boxes. R. 65, pp. 19, 23. Backstretchers were arrested if agents found contraband (including controlled substances used by humans) during the course of their searches. R.65, pp. 23-24.

The record further established that backstretchers acquiesced to the challenged practices out of a fear of losing their jobs. *Serpas* at C12. This fear was based upon the provision in each of the Rules punishing refusal with suspension or revocation of a backstretcher's occupation license. Petition at 11.

3. The Relationship of the Challenged Practices to Petitioners' Enforcement Scheme

The stated purpose of the challenged conduct was to prevent the use of "buzzers" (electrified prongs which stimulate a horse during the race) and illegal horse drugs. *Serpas* at C10. The challenged searches and seizures were but a small part of the array of detection techniques available to petitioners, however. *Serpas* at C9-10. After the entry of injunctive relief, petitioners could continue to "detain horses and conduct metal detector searches of them before the race, make searches of the commercial premises of the racetrack and use drug-testing techniques [on the horses]." *Serpas* at C10. Jockeys (the only persons who can actually apply buzzers to the horses) may be searched with metal detectors before the race. *Id.* Additionally, pursuant

to Section 36a(b) of the Act, enacted since entry of the permanent injunction, all horses must be quarantined in guarded security barns to prevent the use of performance-altering drugs. *Ill. Rev. Stat.* ch. 8, § 37-36a(b)(1987). During the two year period prior to the entry of injunctive relief, moreover, only 7 of the 361 searches of backstretchers, their personal effects and their rooms yielded evidence of buzzers or illegal horse drugs. *Serpas* at C10. Based on this uncontroverted evidence, the District Court concluded that random, warrantless searches of backstretchers and their rooms were an unnecessary, and indeed ineffective, element of petitioners' enforcement scheme. *Serpas* at C9-10.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS COMPORTS WITH THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE

This Court has long recognized the sanctity accorded by the Fourth Amendment to one's home and person, and it has never permitted limitless, discretionary searches and seizures of persons or their residences under the auspices of the administrative search exception. This exception only permits warrantless inspections of commercial property, provided that such inspections are necessary to further a substantial government interest and that the regulatory scheme authorizing such inspections affords sufficient certainty and regularity of application. The challenged practices fail to satisfy any of these requirements, and petitioners fail to cite any authority for the kind of intrusive searches and seizures at issue in this case. Respondents' argument that they can compel waiver of petitioners' privacy rights by withholding their occupation licenses similarly lacks support in the case law and merely underscores the egregiousness of the challenged conduct.

A. This Court Has Consistently Recognized the Special Protection Afforded By the Fourth Amendment Against Searches of Persons and Their Homes

For at least a century, this Court has recognized the sanctity which the Fourth Amendment accords to the home. *Payton v. New York*, 445 U.S. 573, 585 (1980). As this Court recently declared: "It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed .... It is ... a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Welsh v. Wisconsin*, 466 U.S. 740, 748-49 (1984) (citations and quotations omitted). *See also United States v. Karo*, 468 U.S. 705, 714-717 (1984). This long history of protection is why the Fourth Amendment decisions of this Court draw "a firm line at the entrance to the house." *Steagald v. United States*, 451 U.S. 204, 212 (1981). Nothing in the record of this case suggests that this Court should cross that "firm line."

In the face of this special protection which the Fourth Amendment affords the home, petitioners argue that *New York v. Burger*, ___ U.S. ___, 107 S. Ct. 2636 (1987), a decision applying the administrative search exception, justifies their search and seizure practices. In *Burger*, only vehicles, vehicle parts and the records of those items were subject to inspection and no building, let alone a home, was searched. 107 S. Ct. at 2639 n.1. This Court need not issue a writ to make the indisputable point that a junkyard is not a home. Indeed, in *Burger* this Court took care to distinguish between commercial premises and residences: "The expectation of privacy in commercial premises ... is different from, and indeed less than, a similar expectation in an individual's home." 107 S. Ct. at 2642. *Accord Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981) ("the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an

individual's home").

Like *Burger*, none of this Court's other administrative search decisions has extended the permissible scope of search beyond commercial premises. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (liquor industry inspections of catering establishments); *United States v. Biswell*, 406 U.S. 311, 312-13 (1972) (firearm industry inspection of pawn shop); *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981) (mining industry inspection of stone quarries). Thus, where the uncontroverted evidence demonstrates, as in this case, that backstretchers used their quarters *exclusively* for residential purposes, *Burger* and this Court's other administrative search cases provide no support for the challenged conduct.

The special protection of the Fourth Amendment applies with equal force to searches of one's person and personal effects. This Court has recently reaffirmed that personal searches implicate substantial privacy interests, *New Jersey v. T.L.O.*, 469 U.S. 325, 337-338 (1985), and that employees have a reasonable expectation of privacy with respect to personal effects such as a handbag, a briefcase and luggage even when brought into actual work areas. *O'Connor v. Ortega*, ___ U.S. ___, 107 S. Ct. 1492, 1497 (1987). Petitioners, moreover, fail to cite any decision of this Court extending the administrative search exception to warrantless searches of persons or personal effects. In fact, this Court has acknowledged that such searches must be based on no less than individualized suspicion of wrongdoing unless the privacy interests implicated by the searches are minimal and other safeguards are available to assure that privacy rights are not subject to the discretion of officers in the field. *T.L.O.*, 469 U.S. at 342 n.8. *Accord O'Connor*, 107 S. Ct. at 1497. In this case, the challenged searches failed each element of the *T.L.O.* test. They were not based on individualized suspicion, the privacy interests at stake were fundamental, not minimal, and the searches

occurred randomly and at the unrestrained discretion of IDLE agents. *Serpas* at C8.

In short, the decisions of this Court, as recently as last term, have afforded special protection to the very types of searches presented by the facts of this case – searches of homes, persons and personal effects. Petitioners have presented no arguments which should remove backstretchers and their homes from these time-honored protections.

B. The Challenged Practices Are Not Reasonable Because They Lack the Requisite Regularity and Certainty of Application

Even if the personal and home searches challenged in this case could be characterized as administrative, they are not "reasonable" because, among other things, they lack the requisite regularity and certainty of application. *Burger*, 107 S. Ct. at 2644. Warrantless administrative searches are permissible only where they are "carefully limited in time, place and scope." *Biswell*, 406 U.S. at 315. The inspection program must provide a "constitutionally adequate substitute for a warrant," *Donovan*, 452 U.S. at 603, and it cannot leave "unbridled discretion" to search in the hands of agents in the field. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978). In *Camara v. Municipal Court*, 387 U.S. 523, 532-33 (1967), this Court held such discretion fatal to the constitutionality of an inspection scheme: "[t]his is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." *Id.* at 532-33.

In this case, neither the Act nor the Rules provided any of the privacy guarantees required by *Burger*, *Biswell*, *Donovan*, *Marshall* and *Camara*. *See* Petition at 4 (quoting Act). In fact, the Act did not even mention searches of homes or persons, leading the Court of Appeals to conclude that it fell far short of ". . . specifying the 'terms and conditions' under which warrantless searches . . . can be

conducted . . . ." *Serpas* at A8. The Rules, as the Court of Appeals concluded, did not remedy the defect in the statutory scheme by limiting in any way the time or manner of search or the things permitted to be searched. *Serpas* at A9-10. Consequently, IDLE agents in the field routinely exercised unbridled discretion regarding the target, timing, place, scope and manner of personal and residential searches. *Serpas* at A10, C8.

Burger, even if applicable to the facts of this case, affirms the requirement of regularity and certainty. 107 S. Ct. at 2644. The junkyard inspections in *Burger* were upheld on the grounds that the challenged New York statute limited the "time, place and scope" of inspections – they were only to be conducted "during . . . regular and usual business hours" and were only for the purpose of inspecting "records . . . and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises . . . ." 107 S. Ct. at 2648. The regulatory scheme in *Burger*, therefore, contained the necessary limitations which petitioners' scheme lacks.

C. Petitioners Need Not Conduct the Challenged Practices to Satisfy Legitimate Enforcement Needs

The standard of reasonableness governing every search requires a balance of the need for the search against the invasion which the search entails. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315-16 (1978). The search must be "a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests . . . ." *Delaware v. Prouse*, 440 U.S. 648, 659 (1979). An individual's expectation of privacy must be "invaded no more than is necessary to achieve the legitimate [government objective]." *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985).

The uncontroverted evidence in this case revealed that the discretionary and unlimited searches of backstretch-

ers and their rooms were neither productive nor necessary to further petitioners' admittedly legitimate interest in detecting buzzers and illegal horse drugs. *Serpas* at C10. The challenged searches were peripheral to core enforcement techniques, such as the use of metal detectors, drug testing and pre-race detention of horses, *id.*, and were so inessential that petitioners never even attempted to obtain any kind of warrant, *ex parte* or otherwise, during the two year period between entry of preliminary and permanent injunctive relief. R.65, p.27. The uncontroverted evidence before the District Court demonstrated, moreover, that only seven out of 361 searches of backstretchers, their personal effects and their rooms over a two-year period yielded any evidence of buzzers or illegal horse drugs. *Serpas* at C10. Thus, the ineffectiveness of the challenged practices rendered their extreme intrusiveness all the more egregious. Not surprisingly, the District Court concluded that the undisturbed portion of petitioners' enforcement scheme adequately served petitioners' legitimate enforcement needs and that arbitrary and highly intrusive searches of backstretchers and their residences were unnecessary to prevent the use of buzzers and illegal drugs. *Serpas* at C10.

D. The Challenged Practices Cannot Be Justified Under a Theory of Implied Consent

Petitioners briefly suggest that the challenged practices should pass constitutional muster because respondents "impliedly consented" to searches by knowingly and voluntarily entering the regulated field of horse racing. Petition at 18. This consent argument flies in the face of well-established precedent, however. Over fifteen years ago, this Court held that "the legality of an [administrative] search depends not on consent but on the authority of a valid statute." *United States v. Biswell*, 406 U.S. 311, 316 (1972). In this case, the Court of Appeals concluded that the statutory and regulatory scheme lacked the requisite

certainty and regularity of a valid administrative search, *Serpas* at A8-10, and so, in keeping with the *Biswell* holding, it rejected consent as a justification for the challenged conduct. *Serpas* at A11. *Accord Burger*, 107 S. Ct. at 2644 (valid administrative searches must advise that the search has a properly defined scope and limit the discretion of inspecting officers).

Petitioners' related assertion that backstretchers "must accede to the regulation or relinquish the benefit [of employment]," Petition at 18, is similarly misguided. It is well-settled that government may not condition employment on a basis which unreasonably deprives one of constitutionally protected interests. *Rankin v. McPherson*, ___ U.S. ___, 107 S. Ct. 2891, 2896 (1987); *Elrod v. Burns*, 427 U.S. 347, 359-61 (1976) (employment may not be conditioned on partisan support). Thus, while petitioners might be able to justify conditioning employment upon acquiescence to a properly tailored and valid administrative inspection necessary to further a legitimate enforcement need, *see, e.g., Burger*, 107 S. Ct. at 2644, they cannot constitutionally compel economically disadvantaged backstretchers to submit to unnecessary, discretionary and unlimited invasions of their personal and residential privacy. *Serpas* at A11.

II. THE DECISION OF THE COURT OF APPEALS COMPORTS WITH RELEVANT DECISIONS OF OTHER CIRCUITS

Petitioners erroneously state that the Court of Appeals held that administrative searches cannot be conducted absent explicit statutory authority, and then, based on that mistaken premise, assert that its decision creates a conflict with decisions of other circuits. *See* Petition at 20-21, citing *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 577 (1986); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *National Treasury*

Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987).

As noted in the previous section, the Court of Appeals did not limit its holding to the issue of explicit statutory authority. It scrutinized the entire statutory and regulatory scheme, and found no evidence of any constitutionally mandated limitations upon the discretion of IDLE agents to conduct warrantless searches of the persons and homes of backstretchers at the track:

> *Even without explicit statutory authorization* for these searches.... *The regulatory scheme here... falls short of adequately substituting for a warrant....* Hence, we agree with the district court that *neither* the statute *nor* the regulatory scheme here is sufficient to except these searches from the general rule that searches conducted without the safeguard of a warrant are unreasonable and violate the Fourth Amendment....

Serpas at A9-10 (emphasis added and citation omitted).

Since petitioners consistently asserted that explicit statutory authorization was not constitutionally required, the District Court also scrutinized not only the statute but also the Rules and the pattern and practice of search employed by IDLE agents in the field. *Serpas* at C8. It concluded, based on uncontroverted evidence, that the regulatory scheme failed to impose any meaningful limitations upon agents' discretion as to the time, place, manner or scope of search, and that the practices of agents in the field reflected the absence of such limitations: they searched whomever and whatever they wished, whenever they wished. *Id.* Thus the District Court, like the Court of Appeals, did not limit its holding to the issue of statutory authority in concluding that the challenged Rules and practices failed to pass constitutional muster. *Id.*

Accordingly, petitioners' reliance on *Shoemaker*, *McDonell* and *Von Raab* as support for the proposition that explicit statutory authorization is unnecessary to validate

the challenged searches is of no consequence. Similarly, the error in petitioners' initial premise is fatal to their reliance on *Colorado v. Bertine*, ___ U.S. ___, 107 S. Ct. 738 (1987). Neither the Court of Appeals nor the District Court based its holding on such a narrow ground, and there is no conflict with the decisions of any other circuit on this issue.

III. THE COURT OF APPEALS PROPERLY DECLINED TO ABSTAIN BECAUSE PETITIONERS' CHALLENGED PRACTICES PRESENTED AN UNAVOIDABLE QUESTION OF CONSTITUTIONAL LAW

The Court of Appeals correctly declined to abstain in this case because the resolution of a constitutional issue was unavoidable. For over five years, in the District Court, in the Court of Appeals, and indeed in their petition to this Court, petitioners have consistently asserted that respondents have little or no expectation of privacy and that the challenged practices are constitutionally reasonable whether or not statutorily authorized. Petition at 18-21; *Serpas* at A2, C7-8. Petitioners' own arguments, therefore, raised unavoidable federal constitutional issues which the Court of Appeals (and the District Court) had to resolve and which would not have been disposed if the Court had abstained. *Serpas* at A5-7 n.2. In resolving these issues, the Court of Appeals applied well-accepted Fourth Amendment principles in a manner with which even Judge Eschbach, a dissenter on the abstention issue, could not quarrel. *Serpas* at A13.

The premise of petitioners' abstention argument, moreover, is simply false. The Court of Appeals did not base its decision solely upon an interpretation of Section 9(c) of the Act, but rather, as petitioners had urged, on a careful review of the entire regulatory scheme. *Serpas* at A7-10. It then found, without resorting to statutory interpretation, that the regulatory scheme did "not impose any meaningful limitations on [IDLE agents'] discretion . . . " and fell short of adequately substituting for a warrant.

Serpas at A10. Thus the Court of Appeals had to (and did) consider the constitutionality of the challenged searches wholly apart from whether they were authorized by a statute.

Petitioners are state officials who never sought abstention on any ground until after Judge Eschbach raised the question during oral argument on appeal. *Serpas* at A5-6 n.2. When the state has never sought a state court ruling, federal courts should be hesitant to abstain. *See Houston v. Hill*, ___ U.S. ___, 107 S. Ct. 2502, 2512 n.16 (1987) (abstention argument undercut by failure of state to raise the argument in the first instance); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964) (abstention unwarranted where neither party requested it and the litigation has been long delayed). Moreover, the inequity to backstretchers of further delaying the litigation of their constitutional rights weighs heavily against abstention. *See, e.g., Baggett v. Bullitt*, 377 U.S. 360, 379 (1964) (constitutional rights should not be impeded by delay caused by abstention); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965) (semble).

Since petitioners have been willing to litigate the case in federal courts for over five years, since abstention would work substantial hardship on respondents' vindication of fundamental privacy rights, and since abstention would leave unavoidable constitutional issues unresolved, this Court should not entertain petitioners' belated suggestion that it abstain.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Dated: December 18, 1987.

Respectfully submitted,

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